DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0452
Sales and Use Tax
For Tax Years 2003-05

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax—Manufacturing Exemption.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-5-3; IC § 6-8.1-5-1; 45 IAC 2.2-5-8; *Indiana Dep't of Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Indiana Dep't of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520 (Ind. 1983); *Colonial Brick Corp. v. Dep't of State Revenue*, 1998 Ind. Tax LEXIS 70 (Ind. Tax Ct. Jan. 14, 1998); Ind. R. App. P. 65(d); Commissioner's Directive 22 (Jan. 2004); Commissioner's Directive 23 (April 2004).

Taxpayer protests the assessment of use tax on its purchases.

II. Sales and Use Tax— Environmental Exemption: "Dust Collection System."

Authority: IC § 6-2.5-3-2; IC § 6-2.5-5-30; IC § 6-8.1-5-1; Clean Air Act, 42 U.S.C. § 7401, et seq. (2007); 40 C.F.R. § 70.1, et seq. (2007).

Taxpayer protests the assessment of use tax on its purchase of a dust collector.

III. Sales and Use Tax— Packaging Material: Plastic Pallet Covers.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-5-9; IC § 6-8.1-5-1; 45 IAC 2.2-5-16.

Taxpayer seeks an adjustment for sale and use tax paid on packaging material.

IV. Sales and Use Tax—Adjustments.

Authority: IC § 6-2.5-3-2; IC § 6-8.1-5-1; 45 IAC 2.2-5-15.

Taxpayer seeks adjustments to the assessed tax based on information that was unavailable during the original audit review that was later provided by Taxpayer.

V. Sales and Use Tax—Audit Method.

Authority: IC § 6-2.5-1-5; IC § 6-8.1-5-1; IC § 6-8.1-5-4; 45 IAC 2.2-4-3.

Taxpayer seeks adjustment in the assessed tax based upon Taxpayer's various objections to the audit method that was used by the Department to determine the tax base.

VI. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a cement manufacturer in Indiana. Taxpayer has two manufacturing locations of which one uses a dry kiln process ("Dry Location") and the other uses a wet kiln process ("Wet Location"). After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed use tax and assessed a negligence penalty for the tax years 2003, 2004, and 2005. The Department found that Taxpayer had made a variety of purchases on which the Indiana sales tax was not paid at the time of purchase nor was use tax remitted to the Department. Taxpayer protested this imposition of the tax and penalties. An administrative hearing was held, and this Letter of Findings results.

I. Sales and Use Tax—Manufacturing Exemption.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(b), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that use tax was due on purchases of machinery and equipment that Taxpayer had made without paying sales tax on them. Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a).

Taxpayer maintains that as a manufacturer of cement the purchases of certain items were exempt under the "manufacturing exemption" in IC § 6-2.5-5-3(b).

IC § 6-2.5-5-3(b) provides an exemption from sales tax for "manufacturing machinery, tools, and equipment . . . if the person acquiring the property acquires it for direct use in the direct production [or] manufacture . . . of other tangible personal property."

Property acquired for "direct use in the direct production" is defined in 45 IAC 2.2-5-8(c) as "manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process" that have "an immediate effect on the article being produced." Property has

"an immediate effect" when it becomes "an essential and integral part of the integrated process which produces tangible personal property." 45 IAC 2.2-5-8(c).

Accordingly, machinery and equipment purchased for direct use in the production of a manufactured good is subject to use tax unless the property used has an immediate effect on the good produced and is essential to the integrated process used to produce the marketable good.

A. "Waste Fuel System"

DISCUSSION

Taxpayer asserts that the purchases of a waste fuel fan, stuffing box cover, casing liner, circulating pumps, piston, cylinder set, waste fuel rail pump, muffin monster shaft, muffin monster blade, and muffin monster spacer are directly used in and are an integral part of cement manufacturing as part of the "waste fuel system." Taxpayer uses waste fuel to power the kiln, which is used in manufacturing the cement. Before the waste fuel is fed into the kiln, Taxpayer processes the waste fuel through a "waste fuel system" that breaks down and removes pieces of sediment to make the waste fuel burn more efficiently. Taxpayer asserts that since the kiln needs a continuous supply of fuel, then any and all parts of Taxpayer's "waste fuel system" are used in direct production.

During the course of the protest, Taxpayer submitted invoices for the equipment purchased for the "waste fuel system" and a diagram indicating how the system works. Taxpayer further supports its assertion by relying on two different court cases. The first is *Colonial Brick Corp. v. Dep't of State Revenue*, 1998 Ind. Tax LEXIS 70 (Ind. Tax Ct. Jan. 14, 1998), which is an unpublished Tax Court case. The second is *Indiana Dep't of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520 (Ind. 1983).

First, Taxpayer cites to an unpublished court case decision to support its assertion. Taxpayer's reliance on an unpublished tax court case is unjustified because unpublished tax court decisions do not have precedential value. See Ind. R. App. P. 65(d).

Second, the court in *Cave Stone* held that transportation equipment used in the taxpayer's aggregate stone production process was exempt from sales tax because the equipment was essential to achieving the transformation of crude stone into aggregate stone. *Cave Stone*, 457 N.E.2d 520, 525 (Ind. 1983). In arriving at that decision, the *Cave Stone* court found that the "focus of analysis should be whether the equipment is an 'integral part of manufacturing and operates directly on the product during production.'" *Id.*

In applying any tax exemption, including the exemption found within 45 IAC 2.2-5-8(c), the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. App. Ct. 1988).

Taxpayer proposes that *Cave Stone* stands for the proposition that stone manufacture begins with the quarry and ends with the stockpiling of stone and any and all equipment used in between in

the manufacturing process will be exempt. Then, Taxpayer analogizes that since cement manufacturing begins in the quarry with stone production and ends with the cement being packaged, then any and all equipment used by Taxpayer after the stone is removed from the quarry and before packaging is exempt. Thus, Taxpayer implies that *Cave Stone* allows for a blanket exemption to any and all equipment used in the entire process of cement making. However, Taxpayer is mistaken.

As provided above, the court found that the "focus of analysis should be whether the equipment is an 'integral part of manufacturing and operates directly on the product during production.'" *Cave Stone*, 457 N.E.2d at 525. While the "waste fuel system" may make the use of waste fuel more efficient, it is not equipment that has an immediate effect on the manufactured cement. Taxpayer could manufacture cement without using a "waste fuel system." Particularly, since Taxpayer could choose either to use waste fuel without processing it or to purchase fuel that is ready for production. Thus, the "waste fuel system" is a separate system both distinct and removed from the actual manufacturing of the cement. The "waste fuel system" simply functions to process the waste fuel before the fuel enters into the manufacturing process. Accordingly, the processing of the waste fuel is a preproduction activity and does not fall under the exemption.

Therefore, Taxpayer's protest is respectfully denied.

B. Iron Ore Elevator Maintenance

DISCUSSION

Taxpayer asserts that maintenance on the iron ore elevator listed on the audit summary report as "Maint. W/O 1106030 Iron Ore Elevator" is exempt from sales and use tax. Taxpayer maintains that since the iron ore elevator is used in the direct production of cement, then the maintenance to the iron ore elevator is exempt.

During hearing Taxpayer was asked to provide details on the specific maintenance performed, but Taxpayer failed to provide any further information. Nonetheless, pursuant to 45 IAC 2.2-5-8(h)(1) "[m]achinery, tools, and equipment used in the normal repair and maintenance of machinery used in the production process which are predominantly used to maintain production machinery are subject to tax." Since maintenance is subject to tax regardless of the iron ore elevator's status, the Department declines to address the iron ore elevator's status at this time.

Therefore, Taxpayer's protest is respectfully denied.

C. Parts for Kiln

DISCUSSION

Taxpayer asserts that the atomizer and the pump seal were purchased for use in the kiln and are exempt from sales and use tax.

1. Atomizer

Taxpayer asserts that the atomizer listed on the invoice number 005111 was purchased for use in the kiln and is exempt from sales and use tax. Taxpayer maintains that slurry is fired into the kiln to produce clinker and is used directly in the manufacturing of cement. Taxpayer reasons that since the kiln is used in the manufacturing process, parts purchased for the kiln are exempt.

Pursuant to 45 IAC 2.2-5-8(h)(2) "[r]eplacement parts, used to replace worn, broken, inoperative, or missing parts or accessories on exempt machinery and equipment, are exempt from tax." Accordingly, a part purchased for the kiln would be tax exempt to the extent that the kiln is exempt.

Therefore, Taxpayer's protest is sustained.

2. Pump Seal

Taxpayer asserts that the pump seal listed on the invoice number 137 was purchased for use in a pump that pumps diesel into the kiln and is exempt from sales and use tax. Taxpayer reasons that since the diesel pump is in the manufacturing process, parts purchased for it are exempt.

Pursuant to 45 IAC 2.2-5-8(h)(2) "[r]eplacement parts, used to replace worn, broken, inoperative, or missing parts or accessories on exempt machinery and equipment, are exempt from tax." Accordingly, a part purchased for the diesel pump that is attached to the kiln would be tax exempt to the extent that the diesel pump is exempt.

Therefore, Taxpayer's protest is sustained.

D. "Fly Ash System"

DISCUSSION

Taxpayer asserts that three items on purchase order numbers 45001766, 4500131399, and 4500178173 were for purchases relating to its "fly ash system" and are exempt from sales and use tax. During the course of the protest, Taxpayer submitted information for purchases of a "9" square trough," a "drive package for inline screw," "screw conveyors," "seal kits," and "new fly ash screw adjustors" for the "fly ash system" and pictures indicating how the system works to support its assertion.

1. "Conveyor System"

Taxpayer asserts that the "9" square trough," "drive package for inline screw," "screw conveyors," and "seal kits" were acquired for a "conveyor system" that connects to the "fly ash system." The "fly ash system" is used to feed fly ash into the raw mill where it is mixed with other ingredients to form slurry, which is feed into the kiln. The "conveyor system" moves the fly ash from storage into the raw mill. Taxpayer maintains that since these items of machinery continuously feed an ingredient of the final product into the raw mill, the items of machinery are

part of the manufacturing process. Taxpayer reasons that since these items of machinery are part of the manufacturing process, then they are used in direct production of cement and are exempt. As discussed previously, Taxpayer mistakenly implies that *Cave Stone* allows for a blanket exemption to any and all equipment used in the entire process of cement making.

As provided above, the court in *Cave Stone* found that the "focus of analysis should be whether the equipment is an 'integral part of manufacturing and operates directly on the product during production.'" *Cave Stone*, 457 N.E.2d at 525. While the "9" square trough" and "screw conveyors" may be a necessary part of Taxpayer's manufacturing system, the devices are not machinery that has an immediate effect on the manufactured cement. During the time the fly ash is on the "conveyor system," the fly ash is not being mixed, altered, combined, or changed in form. The "conveyor system" simply functions to transport a raw material before it enters into the manufacturing process. Accordingly, the transporting of the fly ash by a "conveyor system" is a preproduction activity and does not fall under the exemption.

Therefore, Taxpayer's protest is respectfully denied.

2. "New Fly Ash Screw Adjusters"

Taxpayer asserts that the charge for a purchase dated November 11, 2003, for "new fly ash screw adjusters" is a charge for labor, which is exempt from sales and use tax. Taxpayer maintains that when the new fly ash screws were installed a separate charge in the amount of $3,795.00 was included for adjusting the fly ash screws listed as "New East Fly Ash Screw Adjusters."

Prior to January 1, 2004, charges for installation that takes place after the delivery of the tangible personal property are generally not subject to sales tax as long as the installation charges are separately stated from the selling price on the bill. See Commissioner's Directive 22 (Jan. 2004) & Commissioner's Directive 23 (April 2004).

Taxpayer has provided sufficient information to establish that this charge was for a separately stated installation charge that is exempt from sales and use tax.

Therefore, Taxpayer's protest is sustained.

FINDING

In summary, Taxpayer's protest of subparts C(1), C(2), and D(2) are sustained subject to the results of a supplemental audit and all of the other subparts are respectfully denied.

II. Sales and Use Tax—Environmental Exemption: "Dust Collecting System."

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(b).

The Department found that use tax was due on the purchases of a dust collector and a lube system for a rotary compressor that Taxpayer had made without paying sales tax. As stated previously, Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a).

Taxpayer maintains that the dust collector and the lube system for a rotary compressor were purchased as parts for a "dust collecting system." Taxpayer asserts that the Indiana Department of Environmental Management ("IDEM") required Taxpayer to install the "dust collecting system" before Taxpayer could receive a "Title V Environmental Permit" from the Environmental Protection Agency under Title V of the Clean Air Act. *See* Clean Air Act, 42 U.S.C. § 7401, et seq. (2007) & 40 C.F.R. § 70.1, et seq. (2007). Taxpayer reasons that since the "dust collecting system" was required by the IDEM then the parts purchased for the dust collecting system are exempt under the "environmental exemption" as defined in IC § 6-2.5-5-30.

IC § 6-2.5-5-30, in relevant part, provides:

> Sales of tangible personal property are exempt from the state gross retail tax if:
> (1) the property constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure predominately used and acquired for the *purpose of complying with any state, local, or federal environmental quality statutes, regulations or standards*; and
> (2) the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture. (*Emphasis added*).

Taxpayer has provided sufficient documentation to support Taxpayer's assertion that the dust collector and lube system for a rotary compressor were purchased to comply with an environmental quality standard and are exempt from sales and use tax under the "environmental exemption" as defined in IC § 6-2.5-5-30.

FINDING

Taxpayer's protest is sustained.

III. Sales and Use Tax—Packaging Material: Plastic Pallet Covers.

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(b).

Taxpayer asserts that it paid sales and use tax on packaging materials that were exempt as nonreturnable wrapping materials or containers under IC § 6-2.5-5-9(d). Taxpayer maintains that since the plastic covers are placed over pallets of the packaged product to help keep them dry during transportation and are not returned to the Taxpayer, the covers meet the exemption for nonreturnable wrapping materials.

As stated previously, Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a). However, under IC § 6-2.5-5-9(d), "[s]ales of wrapping material and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as nonreturnable packages for selling the contents that he adds." In addition, 45 IAC 2.2-5-16, in its relevant parts, provides:

> (a) The state gross retail tax shall not apply to sales of nonreturnable wrapping materials and empty containers to be used by the purchaser as enclosures or containers for selling contents to be added, and returnable containers containing contents sold in a sale constituting selling at retail and returnable containers sold empty for refilling.
> (b) In general the gross proceeds from the sale of tangible personal property in a transaction of a retail merchant constituting selling at retail are taxable. This regulation *[45 IAC 2.2]* provided an exemption for wrapping materials and containers.
> (c) General rule. The receipt from a sale by a retail merchant of the following types of tangible personal property are exempt from state gross retail tax:
> (1) Nonreturnable containers and wrapping materials including steel strap and shipping pallets to be used by the purchaser as enclosures for selling tangible personal property.
> . . .
> (d) Application of general rule.
> (1) Nonreturnable wrapping material and empty containers. To qualify for this exemption, nonreturnable wrapping materials and empty containers must be used by the purchaser in the following way:
> (A) The purchaser must add contents to the containers purchased; and
> (B) The purchaser must sell the contents added.
> . . .

Accordingly, the exemption is provided for wrapping materials or containers that act to enclose or contain a product. While the plastic covers, which are placed over the packaged pallets of product to keep them dry during transportation, may help to preserve the product during shipping, the plastic covers are not the packaging that acts to enclose or contain the product. Therefore, the plastic covers do not meet the exemption for nonreturnable wrapping materials or containers.

FINDING

Taxpayer's protest is respectfully denied.

IV. Sales/Use Tax—Adjustments.

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(b).

As stated previously, Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a).

Taxpayer seeks adjustments to the assessed tax based on information that was unavailable during the original audit review that was later provided by Taxpayer.

A. Bags of Cement Purchased For Resale

DISCUSSION

Taxpayer purchased bags of cement without paying sales tax at the time of purchase, but did remit use tax to the Department. Taxpayer asserts that the use tax was paid in error because the bags of cement were purchases for resale, which are exempt from sales and use tax under 45 IAC 2.2-5-15(a).

Pursuant to 45 IAC 2.2-5-15(a), purchases made for resale in the regular course of the taxpayer's business are exempt from sales and use tax. Based on the documentation that Taxpayer provided, it appears that Taxpayer paid use tax on the bags of cement that were purchased for resale. Therefore, the bags of cement would be exempt from sales and use tax entitling Taxpayer to a refund of the use tax it paid.

Therefore, Taxpayer's protest is sustained subject to the results of a supplemental audit.

B. Use Tax Paid in Error

DISCUSSION

The Department found that Taxpayer had made various purchases without paying sales tax on them at the time of purchase. The Department made determinations that certain of these purchase were wholly taxable, partially taxable, or wholly exempt and issued assessments in the corresponding amounts of use tax due.

Taxpayer asserts that Taxpayer erred when it paid use tax on the entire purchase amount of various purchases that the Department determined were partially or totally exempt under the manufacturing exemptions. Taxpayer maintains that it does not dispute the percentages determined as taxable or exempt, but is only requesting a refund for the amount of use tax it paid in error on the exempt amounts. Taxpayer has provided sufficient evidence to demonstrate that use tax was paid in error on certain tax exempt amounts.

Therefore, Taxpayer's protest is sustained subject to the results of a supplemental audit.

FINDING

In summary, Taxpayer's protest of subparts A and B are sustained subject to the results of a supplemental audit.

V. Sales and Use Tax—Audit Method.

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(b).

Taxpayer seeks adjustment in the assessed tax based upon Taxpayer's various objections to the audit method that was used by the Department to determine the tax base.

A. Odd Month Purchases

DISCUSSION

Taxpayer asserts that the inclusion of invoices from odd months violates the audit agreement because the agreement states that only invoices from the even months of the year (February, April, June, August, October, and December) were to be used.

Taxpayer signed the "Agreement for Projecting Audit Results" for the "Wet Location," which provided that a statistical sampling method would be used to project amounts for the expense accounts for the entire audit period. However, Taxpayer refused to sign the "Agreement for Projecting Audit Results" for the Dry Location which stipulated that a block sampling method would be used for purchase invoices from the "Fixed and Variable Maintenance Stores Issues/Operating Stores Issues accounts" and only invoices from the odd months would be used for these accounts to project the amounts for the entire audit period amounts. This unsigned agreement to use the odd months was only for those two accounts and only at the Dry Location.

Accordingly, the odd months were either allowed under the signed agreement for the "Wet Location" or were not allowed for purchases in the above two accounts for the "Dry Location." Taxpayer has not provided information that the odd month invoices were from the "Dry Location" for either of the above two accounts. In addition, Taxpayer did not cite any statute, regulation, or case law for the proposition that the Department was required to accept Taxpayer's assertions as to the time and nature of these transactions without providing the supporting documentation.

In fact, IC § 6-8.1-5-4(a) provides:

> Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source

documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Pursuant to IC § 6-8.1-5-1(b), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer has failed to produce any documentation that demonstrates that the Department's assessment based on odd month invoices was incorrect, Taxpayer has failed to meet its burden.

Therefore, Taxpayer's protest is respectfully denied.

B. Inclusion of February Purchases

DISCUSSION

Taxpayer asserts that the inclusion of purchase invoices from February does not fairly represent Taxpayer's average purchases because its operations were shut down for repairs during that month. Taxpayer maintains that these events caused most of its purchases to be taxable during February when--if the same purchases had occurred in another month--the purchases would not have been taxable.

If Taxpayer had reservations about the inclusion of purchases from the month of February, Taxpayer should have addressed these concerns before completion of the audit. Prior to completion of the audit, Taxpayer and the Department agreed to a sampling period which would be used to compute a projection of taxable purchases because of the volume of invoices involved. Taxpayer agreed to the inclusion of the February purchases during the audit period and may not to alter the agreement after the fact.

Therefore, Taxpayer's protest is respectfully denied.

C. "Freight and Transportation"

DISCUSSION

Taxpayer asserts that when the Department issued assessments that were based upon the assumption that freight and transportation charges were taxable in 2005 to determine the taxable percent in 2003, it was incorrect because "freight and transportation charges" were not taxable until 2004. Taxpayer reasons that the percentage used to determine the taxability of receipts in 2003 would be incorrect to the extent that it includes the taxable "freight and transportation charges."

Taxpayer's assertion that beginning on January 1, 2004, all delivery charges are taxable regardless of the shipping terms involved is correct. *See* IC § 6-2.5-1-5(a)(4). However, for the tax year 2003 the Department refers to 45 IAC 2.2-4-3, which provides:

> (a) Separately stated delivery charges ["freight and transportation charges"] are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on the behalf of the seller of property not owned by the buyer.
> (b) The following guidelines have been developed:
> (1) Delivery charge separately stated with F.O.B. destination—taxable.
> (2) Delivery charge separately stated with F.O.B origin—nontaxable.
> (3) Delivery charge separately stated where no F.O.B. has been established—nontaxable.
> (4) Delivery charges included in the purchase price are taxable.
> (c) Two considerations must always be kept in mind in applying these guidelines:
> (1) The rules do not override established interstate commerce exemptions recognized by IC 6-2.1-3-3 (see 6-2.5-5-24(b)(010) *[45 IAC 2.2-5-54]*).
> (2) The rules are only applicable in determining whether or not the delivery charges of an otherwise taxable sale is also subject to sales or use tax.

Accordingly, for the tax year 2003, "freight and transportation charges" are taxable unless the property being delivered is owned by the buyer at the time of delivery. Taxpayer has not provided any information that would indicate that the property was owned by anyone other than Taxpayer at the time of delivery. In addition, Taxpayer did not cite any statute, regulation, or case law for the proposition that the Department was required to accept Taxpayer's assertions as to the nature of these transactions without providing the supporting documentation.

In fact, IC § 6-8.1-5-4(a) provides:

> Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Pursuant to IC § 6-8.1-5-1(b), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer has failed to produce any documentation that demonstrates that the Department's assessment of tax for the freight and transportation charges for the 2003 tax year was incorrect, Taxpayer has failed to meet its burden.

Therefore, Taxpayer's protest is respectfully denied.

D. Use of General Ledger Amounts

DISCUSSION

Taxpayer asserts that the Department erred when it used the general ledger amounts from its accounting system as the taxable base amounts because the general ledger amounts would include the tax that the Taxpayer paid. Taxpayer reasons that when tax is assessed on tax that Taxpayer has already paid, the tax base was overstated.

However, Taxpayer has not provided any information that would indicate that the taxable base amounts would include the tax that the Taxpayer has paid. In addition, Taxpayer did not cite any statute, regulation, or case law for the proposition that the Department was required to accept Taxpayer's assertions as to the nature of these transactions without providing the supporting documentation.

In fact, IC § 6-8.1-5-4(a) provides:

> Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Pursuant to IC § 6-8.1-5-1(b), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer has failed to produce any documentation that demonstrates that the Department's assessment using the general ledger amounts as the taxable base was incorrect, Taxpayer has failed to meet its burden.

Therefore, Taxpayer's protest is respectfully denied.

FINDING

In summary, Taxpayer's protest of all the above listed subparts is respectfully denied.

VI. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and ten percent negligence penalties for the tax years in question. Taxpayer protests the imposition of the penalties. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides "if a person . . . incurs, upon examination by the department, a deficiency that is due to negligence . . . the person is subject to a penalty."

The Department refers to 45 IAC 15-11-2(b), which states:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is

> treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). While Taxpayer has established that it does not owe some of the proposed assessments, Taxpayer has not affirmatively established that its failure to pay the remaining deficiencies was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest to the imposition of the penalty is respectfully denied.

AB/LS/DK—August 13, 2007